

REMARKS

Claims 10 to 25 are now pending.

Applicant respectfully requests reconsideration of the present application in view of this response.

With respect to paragraph two (2) of the Final Office Action, claims 10 to 25 were rejected under the first paragraph of 35 U.S.C. § 112 as to the written description requirement.

The Final Office Action (at page 2) conclusorily asserts that claim 10 recites “measures *only* in a substantially vertical direction,” but that, the specification does not “provide support for the claim terminology.” In addition, the Final Office Action (at page 7) conclusorily asserts that “alignment [of the distance measuring device] does not equate to the range of measurement.”

In fact, the Substitute Specification at page 1, lines 10 to 11, specifically states that “*The distance measuring device is only to be aligned essentially vertically.*” In addition, the Substitute Specification at page 4, lines 6 to 9, further states that a “*distance measuring device is provided which is aligned vertically to detect such a truck underride,*” and that, “*distance measurement takes place in the z direction.*” Furthermore, the Substitute Specification (at page 4, lines 12 to 17) states that:

*The distance measuring device ... is typically installed in a vertical position. This results in sensing being possible in the z direction. **During normal driving, no obstacle is typically to be detected in the bumper area, so that the sensors send predominantly zero signals. Should an obstacle or a truck appear in this area, the sensor then sends a signal different from zero.***

Moreover, the Substitute Specification (at page 5, lines 2 to 3) states that “[s]ensors 23 [shown in Figure 2] have an upward sensing area.” In contrast, the Substitute Specification at page 3, lines 10 to 12, states that a “*radar sensor, for example, which is installed on the bumper in the horizontal direction, monitors the surroundings.*”

Accordingly, the Substitute Specification plainly differentiates between a sensor installed in a horizontal direction that monitors the surroundings, and a sensor aligned in a vertical direction that measures in a z direction (or vertically). Accordingly, the Substitute Specification makes clear that the alignment of the sensor is correlated with the resultant measuring direction.

Accordingly, contrary to the conclusory assertions of the Final Office Action, it is respectfully submitted that the vertical alignment also results in vertical distance measurement, as provided for in the context of the presently claimed subject matter. This is made clear by the fact that the sensor sends a non-zero signal only when an obstacle appears in the bumper area. During normal driving, when no obstacle is in the bumper area, zero signals are sent by the sensor because it senses only in a vertical direction.

If the sensor also sensed in a non-vertical direction, it would not send predominantly zero signals during normal driving because objects laterally adjacent the vehicle would be sensed. Thus, the Specification clearly supports the feature in which the measuring device measures only in a substantially vertical direction. In addition, Figures 1 and 2 of the specification plainly provide that the vertical distance measuring device measures only in a substantially vertical direction away from a vehicle underside. In particular, Figure 2 clearly provides an upward sensing area 22 of measuring sensor 23. Thus, the Substitute Specification plainly provides plain and specific support for claim 10.

It is respectfully submitted that the Office Action reflects a literalistic and therefore “in haec verba” view of the claims. In the case of *Chemcast Corp. v. Arco Ind. Corp.*, 5 U.S.P.Q.2d 1225, 1237 (E.D. Mich. 1987), for example, the court made plain that amendments are proper when they “*merely clarify or make definite that which was expressly or inherently disclosed in the parent application or . . . conform the specification to matter originally disclosed in the drawings or claims*” or when it is “*something that might fairly be deduced from the original application.*” (Quoting *Stearn v. Superior Distributing Co.*, 674 F.2d 539, 544, 215 U.S.P.Q. 1089, 1093 (6th Cir. 1982) (citations omitted)).

Still further, as stated by the Board in Ex parte Harvey, 3 U.S.P.Q. 2d 1626, 1627 (Bd. Pat. App. Int. 1986) (emphasis added, citations omitted):

Compliance with the written description requirement of Section 112 only requires that appellant's application contain sufficient disclosure, *expressly or inherently*, to make it clear to persons skilled in the art that appellant possessed the subject matter claimed. The test for determining compliance with the written description requirement is whether the disclosure of the application as originally filed reasonably conveys to the artisan that the inventor had possession of the claimed subject matter, rather than the presence or absence of literal support in the specification for the claimed language.

Likewise, as stated by the Board in Ex parte Sorenson, 3 U.S.P.Q. 2d 1462, 1463 (Bd. Pat. App. Int. 1987) (emphasis added):

[W]e are mindful that appellant's specification need not describe the claimed invention in *ipsis verbis* to comply with the written description requirement. *The test is whether the originally filed specification disclosure reasonably conveys to a person having ordinary skill that applicant had possession of the subject matter later claimed. . . . Moreover, the Examiner has the initial burden of presenting evidence or reasons why persons skilled in the art would not recognize in appellant's specification disclosure a description of the invention defined by the claims.*

In particular, the Sorenson Board, noting that the examiner only essentially stated that the claim expressions at issue did not “appear in the original disclosure” and that the claim expressions were therefore “not adequately supported by the few specific compounds in the specification”, found that the examiner had not met his initial burden of “presenting evidence why a person having ordinary skill in the art would not recognize in appellant's specification a description of the invention defined by the claims” — and that the “only reasoning presented” that the Board could discern was an “example of *ipse dixit* reasoning, resting on a bare assertion by the Examiner”.

Thus, to satisfy the written description requirement, all that is required is “reasonable clarity.” (MPEP § 2163.02). Also, an adequate description may be made in any way through express, implicit, or even inherent disclosures in the application, including words, structures, figures, diagrams, and/or formulae. (MPEP §§ 2163(I) & 2163.02). Finally, it is important to be mindful of the generally inverse correlation between the level of skill and knowledge in the art and the specificity of disclosure necessary to satisfy the written description requirement. (MPEP § 2163(II)(A)(2)) (More “predictable” or “mature” subject matter requires a lesser showing of possession than in more “unpredictable” subject matter).

Accordingly, claim 10 satisfies the written description requirement and it is therefore allowable, as are its dependent claims 11 to 25.

Withdrawal of these rejections of the claims is therefore respectfully requested.

As to paragraph four (4) of the Final Office Action, claims 10 to 13, and 16 were rejected under 35 U.S.C. § 102(b) as anticipated by Andre et al., Patent No. DE 19822184.

As regards the anticipation rejections of the claims, to reject a claim under 35 U.S.C. § 102, the Office must demonstrate that each and every claim feature is identically described

or contained in a single prior art reference. (See *Scripps Clinic & Research Foundation v. Genentech, Inc.*, 18 U.S.P.Q.2d 1001, 1010 (Fed. Cir. 1991)). As explained herein, it is respectfully submitted that the Final Office Action does not meet this standard, for example, as to all of the features of the claims. Still further, not only must each of the claim features be identically described, an anticipatory reference must also enable a person having ordinary skill in the art to practice the claimed subject matter. (See *Akzo, N.V. v. U.S.I.T.C.*, 1 U.S.P.Q.2d 1241, 1245 (Fed. Cir. 1986)).

As further regards the anticipation rejections, to the extent that the Final Office Action may be relying on the inherency doctrine, it is respectfully submitted that to rely on inherency, the Office must provide a “basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic *necessarily* flows from the teachings of the applied art.” (See M.P.E.P. § 2112; emphasis in original; and see *Ex parte Levy*, 17 U.S.P.Q.2d 1461, 1464 (Bd. Pat. App. & Int’f. 1990)). Thus, the M.P.E.P. and the case law make clear that simply because a certain result or characteristic may occur in the prior art does not establish the inherency of that result or characteristic.

Claim 10 includes the feature in which *the vertical distance measuring device measures only in a substantially vertical direction away from a vehicle underside*. As explained above, support for this claim feature is disclosed in the Substitute Specification, e.g., Substitute Specification at page 1, lines 10 to 11; page 4, lines 6 to 17; page 5, lines 2 to 3; Abstract, lines 1 to 3; and Figures 1 and 2.

As to the “Andre” reference, Figure 1 concerns a spacer sensor that measures horizontal distances, as well as vertical distances toward the vehicle underside. In this regard, the “Andre” reference refers to combining its spacer sensor with a speed control sensor or a park assist sensor. This arrangement wholly differs from the presently claimed subject matter, since the sensor of the “Andre” reference does not measure only in a substantially vertical direction away from a vehicle underside, as provided for in the context of the presently claimed subject matter of claim 10.

Therefore, the “Andre” reference does not identically disclose (or even suggest) the feature in which the vertical distance measuring device measures only in a substantially vertical direction away from a vehicle underside, as provided for in the context of claim 10.

Accordingly, claim 10 is allowable, as are its dependent claims 11 to 13 and 16.

Withdrawal of these anticipation rejections is therefore respectfully requested.

With respect to paragraph six (6) of the Final Office Action, claims 14, 15 and 18 to 25 were rejected under 35 U.S.C. § 103(a) as unpatentable over the “Andre” reference.

To reject a claim under 35 U.S.C. § 103(a), the Office bears the initial burden of presenting a *prima facie* case of obviousness. *In re Rijckaert*, 9 F.3d 1531, 1532, 28 U.S.P.Q.2d 1955, 1956 (Fed. Cir. 1993). To establish *prima facie* obviousness, three criteria must be satisfied. First, there must be some suggestion or motivation to modify or combine reference teachings. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988). This teaching or suggestion to make the claimed combination must be found in the prior art and not based on the application disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991).

Also, as clearly indicated by the Supreme Court in *KSR*, it is “important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the [prior art] elements” in the manner claimed. *See KSR Int’l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727 (2007). In this regard, the Supreme Court further noted that “rejections on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *Id.*, at 1396. Second, there must be a reasonable expectation of success. *In re Merck & Co., Inc.*, 800 F.2d 1091, 231 U.S.P.Q. 375 (Fed. Cir. 1986). Third, the prior art reference(s) must teach or suggest all of the claim features. *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (C.C.P.A. 1974).

Claims 14, 15 and 18 to 25 depend from claim 10, and they are therefore allowable for essentially the same reasons as claim 10. Moreover, it is respectfully submitted that rearranging parts or duplicating parts is not obvious in view of the particular benefits derived from the features of claims 14, 15, and 18 to 25, and parent claim 10, as provided for in the Substitute Specification (including, for example, at page 1, lines 19 to 27; and page 4, lines 8 to 12, and lines 30 to 31).

In addition, as admitted by the Final Office Action at page 4, the “Andre” reference does not disclose (or even suggest) the feature in which the vertical distance measuring device is situated on a bumper, nor that the vertical distance measuring device is situated on a rear bumper, as provided for in the context of claims 14 and 18.

Further, as admitted by the Final Office Action at page 5, the “Andre” reference does not disclose (or even suggest) the feature in which the at least one vertical distance measuring device includes four vertical distance measuring devices for carrying out distance

measurements at four locations on the bumper distanced from one another, as provided for in the context of claim 15.

Accordingly, claims 14, 15, and 18 to 25 are allowable for at least the above reasons.

With respect to paragraph seven (7) of the Final Office Action, claim 17 was rejected under 35 U.S.C. § 103(a) as unpatentable over the “Andre” reference as applied to claim 10 in view of Cho, U.S. Patent No. 6,408,237.

Claim 17 depends from claim 10 and it is therefore allowable for at least the same reasons as claim 10, since the secondary “Cho” reference does not cure -- and is not asserted to cure -- the critical deficiencies of the principal reference. Specifically, the “Cho” reference does not disclose (or even suggest) the feature in which the vertical distance measuring device measures only in a substantially vertical direction away from a vehicle underside, as provided for in the context of claim 10. It is also respectfully submitted that configuring the device to sense pedestrians is not obvious in view of the particular benefits derived from the features of claim 17, and base claim 10, as explained in the Substitute Specification (including, for example, at page 2, lines 10 to 24).

Accordingly, claim 17 is allowable for at least the above reasons.

As further regards all of the obviousness rejections, any Official Notice relied on by the Office is respectfully traversed to the extent that it is maintained and it is requested that the Examiner provide specific evidence to establish those assertions and/or contentions that may be supported by the Official Notices under 37 C.F.R. § 1.104(d)(2) or otherwise. In particular, it is respectfully requested that the Examiner provide an affidavit and/or that the Examiner provide published information concerning these assertions. This is because the § 103 rejections are apparently being based on assertions that draw on facts within the personal knowledge of the Examiner, since no support was provided for these otherwise conclusory and unsupported assertions. (See also MPEP § 2144.03).

Withdrawal of the obviousness rejections is therefore respectfully requested.

In sum, claims 10 to 25 are allowable for at least the above reasons.

CONCLUSION

It is therefore respectfully submitted that all of claims 10 to 25 are allowable. It is therefore respectfully requested that the objections and rejections be withdrawn, since all issues raised have been addressed and obviated. An early and favorable action on the merits is therefore respectfully requested.

Respectfully Submitted,

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